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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ALL NIPPON AIRWAYS COMPANY,) Case No C07-03422 EDL
LTD.) Hon. Elizabeth D. Laporte
Plaintiff,)
vs.)
UNITED AIR LINES, INC ,)
Defendant)
UNITED AIR LINES, INC.)
Counter-Plaintiff,)
vs.)
ALL NIPPON AIRWAYS COMPANY,)
LTD.)
Counter-Defendant.)

Defendant United Air Lines' Motion to Compel Production of Person Most Knowledgeable and for Protective Order

Hearing Date: November 13, 2007
Hearing Time: 9:00 a.m.

Defendant, United Air Lines, Inc , by and through its attorneys, Jaffe Raitt Heuer & Weiss, P.C., hereby gives notice that the instant Motion to Compel Production of Person Most Knowledgeable and for Protective Order will come for hearing in the courtroom of the Honorable Elizabeth D. Laporte on November 13, 2007, at _____ a.m./p.m.

Defendant United Air Lines, Inc. (“United”) hereby moves this Court (1) for entry of an order under Fed. R. Civ. P. 37 compelling plaintiff All Nippon Airways Co., Ltd., (“ANA”) to produce for deposition under Fed. R. Civ. P. 30(b)(6) the person most knowledgeable of certain issues pertaining to the parties’ Standard Ground Handling Agreement and Annexes thereto (collectively, the “SGHA”) and (2) for entry of a protective order under Fed. R. Civ. P. 26(c)(7) to prevent the release and dissemination of certain highly confidential, proprietary information produced in discovery and to limit its exposure to attorneys’ eyes only. In accordance with Fed R. Civ. P. 26(c) and 37(a)(2)(A), United provides the Declaration of Scott Torpey, attached as **Exhibit 2** to the supporting brief, to establish that it has in good faith conferred or attempted to confer with ANA in an effort to secure ANA’s cooperation without court action.

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Case No. C07-03422 EDL
Hon. Elizabeth D Laporte

**Defendant United Air Lines'
Brief in Support of Motion to
Compel Production of Person
Most Knowledgeable and for
Protective Order**

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STATEMENT OF ISSUES TO BE DECIDED

- I. WHETHER THIS COURT SHOULD COMPEL PRODUCTION OF THE PERSON MOST KNOWLEDGEABLE OF CERTAIN ISSUES PERTAINING TO THE SGHA BECAUSE THE SGHA CONSTITUTES A BASIS OF UNITED'S COUNTER-CLAIMS FOR NEGLIGENCE AND DECLARATORY RELIEF, AS WELL AS ONE OF ITS AFFIRMATIVE DEFENSES, AND ANA HAS DENIED THE APPLICABILITY OF THE SGHA TO THE FACTS OF THIS CASE, THEREBY PLACING THE SGHA'S TERMS, EFFECT, AND ITS UNDERLYING NEGOTIATIONS SQUARELY AT ISSUE?
- II. WHETHER THIS COURT SHOULD ENTER THE PROPOSED PROTECTIVE ORDER ATTACHED AS EXHIBIT 1 TO PREVENT THE RELEASE AND DISSEMINATION OF CERTAIN HIGHLY CONFIDENTIAL, PROPRIETARY INFORMATION PRODUCED IN DISCOVERY?

INTRODUCTION

2 After the parties conducted a meet and confer to discuss the issues that have resulted in
3 discovery impasse, United was forced to file the instant motion under Fed. R. Civ. P. 37 and
4 26(c)(7). ANA wrongfully refuses to produce for deposition under Fed. R. Civ. P. 30(b)(6) the
5 person most knowledgeable (“PMK”) of the terms of the SGHA and its underlying negotiations,
6 claiming that the SGHA has no relevance to this case. ANA’s belief that the SGHA has no
7 relevance is incorrect, especially in light of its own pleadings, which accuse United of negligence
8 in providing services under the SGHA. The SGHA also forms the basis of two of United’s
9 counter-claims against ANA (breach of contract and declaratory relief) and one of its affirmative
10 defenses. ANA denies that the SGHA and its terms have any legal impact in this case. Therefore,
11 the SGHA, its terms, and the facts and circumstances concerning its negotiations and the parties’
12 underlying intent in entering the SGHA are all relevant issues in this matter. This Court should
13 enter an order compelling ANA to cooperate and produce the PMK.

14 ANA has also refused to stipulate to an appropriate protective order to make for attorneys'
15 eyes only review certain documents containing highly confidential, proprietary information
16 produced in the course of discovery available, although the parties have made headway as to
17 certain language to which they both can agree. A protective order is necessary because the parties,
18 who are business competitors, will produce documents containing very sensitive proprietary
19 information concerning secret financial matters. United risks giving ANA a competitive boost by
20 exposing this information to ANA in general, but realizes that certain information contained in the
21 requested documents is or may be relevant. Therefore, United seeks entry of the attached
22 proposed Protective Order (**Exhibit 1**), which provides a two-tiered protective procedure for
23 documents and other information produced during the course of discovery and imparts the highest
24 level of confidentiality — for attorney's eyes only — only to those documents containing the most
25 sensitive financial information. This proposed Protective Order incorporates changes upon which
26 the parties were able to come to an agreement, as fully explained in the Declaration of Scott
27 Torpey accompanying this motion and brief as **Exhibit 2**.

STATEMENT OF FACTS AND PROCEDURE

A. THE MOTION TO COMPEL UNDER FED. R. CIV. P. 37

1. The SGHA and Its Relevance to This Litigation

On June 29, 2007, ANA filed this lawsuit against United. This action arises from an

October 7, 2003, ground collision between an ANA airplane and a United airplane. In its Complaint for Damages, ANA alleges that United's negligence caused the collision (*See generally* Complaint for Damages (Doc. No. 1).) In its Affirmative Defenses, United advances that the terms of the SGHA, which is attached as Exhibit 1 to Doc. No. 6, defeat ANA's "claims in whole or in part, and/or cap[s] UAL's liability to plaintiff, if any, at \$1,500,000.00." (Affirmative Defenses (Doc. No. 6), ¶ 4.)

In its Counter-Complaint, United alleges a claim for breach of contract (Count Three) and for declaratory relief (Count Four) based on the SGHA and Annex B thereto, ¶¶ 4.2-4.3 which generally require ANA to indemnify United for damages arising from its provision of services to ANA and also caps United's liability for hull damage at \$1.5 million. The SGHA and its Annexes are attached collectively to United's Answer, Counter-Complaint, and Affirmative Defenses as Exhibit 1. (*See* Counter-Complaint (Doc. No. 6), ¶¶ 21-35). Responding to the Counter-Complaint, ANA admits the parties entered into the SGHA, but denies the Annexes were in effect at the time of the accident or are "applicable to the facts or circumstances related to this accident or claim" (*See* Answer (Doc. No. 11), ¶¶ 22-24, 30-32).

2. ANA's Refusal to Produce a PMK

On September 12, 2007, United served on ANA its Amended Notice of Taking Video Depositions. (Torpey Decl. (**Exhibit 2**), ¶ 2, Ex. A) This notice requested ANA to produce its PMK for deposition on November 30, 2007, with regard to the following issues related to the SGHA:

1. Negotiations leading up to agreement and signature of the “Standard Ground Handling Agreement” (including “Annex A – Ground Handling Services”

1 and “Annex B – United Services IATA Standard Ground Handling
 2 Agreement” attached to the “Standard Ground Handling Agreement”).
 3 2. Interpretation and intent of the provisions within the “Standard Ground
 4 Handling Agreement” (including “Annex A – Ground Handling Services”
 5 and “Annex B – United Services IATA Standard Ground Handling
 6 Agreement” attached to the “Standard Ground Handling Agreement”)
 7 3. The applicability of one or more of the terms within the “Standard Ground
 8 Handling Agreement” (including “Annex A – Ground Handling Services”
 9 and “Annex B – United Services IATA Standard Ground Handling
 10 Agreement” attached to the “Standard Ground Handling Agreement”) the
 11 events of January 22, 2005 [sic] which are at issue in this litigation [Torpey
 12 Decl ¶ 2, Ex. A.]

13 In response to the PMK deposition notice, ANA flatly refused to comply with United’s
 14 discovery request. ANA’s position is that, in the absence of any motion on its part for a protective
 15 order under Fed. R. Civ. P. 26(c), it will not comply with the PMK deposition notice until ANA
 16 somehow “proves its case” with respect to the SGHA issue. In other words, ANA demands that
 17 United refute to ANA’s satisfaction ANA’s own contention that the SGHA is somehow
 18 inapplicable to United’s breach of contract claim and claim for declaratory relief, which are
 19 expressly premised on the SGHA and its provisions. ANA’s counsel states:

20 Further to my letter of August 30, 2007,[¹] and your request for a “PMK,” no such

¹ In correspondence of August 30, 2007, ANA’s counsel stated:

As it is clear on the face of the GHA [Ground Handling Agreement] referred to in and attached to
 United’s Counter Complaint that the GHA could not possibly have anything to do with any
 issue in this case, I have no intention of bringing any ANA witness to the U.S. on this subject
 until United establishes some basis for this affirmative defense. Moreover, as the GHA
 appears to be United’s affirmative defense, I would appreciate a response to my inquiry as to
 “what do you expect to inquire about at a deposition that could be answered through
 Interrogatories or Admissions.” See my email of August 21, 2007. In any event, if United is
 serious about asserting the GHA as an affirmative defense, ANA would be entitled to ascertain
 the nature and basis of this claim before providing a corporate witness to testify on the subject.
 Please describe the nature and basis of the defense and how the referenced document could
 possibly apply to any fact at issue in this case. [Torpey Decl., ¶ 3, Ex. C.]

1 witness will be provided unless you can explain how the Ground Handling
 2 Agreement referred to in and attached to your Counter-Complaint could have any
 3 relevance to any issue in this case and why any question regarding this agreement
 4 cannot be answered through interrogatories or admissions. [Torpey Decl. ¶ 3, Ex
 5 B]

6 In response to ANA's correspondence, counsel for United faxed a letter to ANA's counsel
 7 on September 25, 2007, requesting a further meet and confer on the PMK issue. (Torpey Decl. ¶
 8 4, Ex. D) Curiously, rather than respond directly to United's attorneys, counsel for ANA
 9 responded by faxing a letter to United States Aviation Underwriters, Inc., who is the insurer that
 10 hired the undersigned to represent United. In this correspondence, ANA stood by its position that
 11 the SGHA is irrelevant to this litigation. ANA also raised new issues concerning the validity of
 12 the SGHA and related Annexes that United attached to its Answer and Counter-Complaint. These
 13 issues are discussed fully below. (Torpey Decl. ¶ 5, Ex. E.)

14 **a. The 1998 SGHA and Annexes Thereto**

15 Admittedly, United may have made an unintentional mistake in appending the 1991 SGHA
 16 and its Annexes as Exhibit 1 to its Affirmative Defenses and Counter-Complaint. As counsel for
 17 ANA clarified in his September 25, 2007, letter to United States Aviation Underwriters, the Annex
 18 B that United appended as part of Exhibit 1 states, "the terms of the Main Agreement and Annex
 19 A of the SGHA of April 1998 . . . shall apply as if such terms were repeated here in full" (Doc. 6,
 20 Exhibit 1, Annex B, pg. 1 PREAMBLE). (Torpey Decl. ¶ 5, Ex. E, pg. 2.) In light of this
 21 language, it does appear that ANA is correct in its assertion that the 1991 SGHA is outdated
 22 (Torpey Decl. ¶ 6.) Attached to his September 25, 2007, letter, counsel for ANA provided United
 23 with the SGHA and Annexes thereto that were effective at the time of the October 7, 2003, ground
 24 collision. (Torpey Decl. ¶ 5, Ex. E, Attachments 1-3) Based on its review of these documents
 25 and investigation into underlying circumstances, United can now confirm that the documents
 26 appended to ANA's September 25, 2007, letter accurately reflect the SGHA and Annexes thereto
 27 that were in effect in October 2003. This Court has stated its willingness to permit United to
 28 amend its pleadings to reflect this change in information, which is something United will file very

1 shortly. (Torpey Decl. ¶ 6.)

2 **b. A Distinction without a Real Difference**

3 ANA's position is that the "new" SGHA and its Annexes do not support the allegations
 4 United has made in its Affirmative Defenses and Counter-Complaint. In his September 25, 2007,
 5 letter, counsel for ANA explained:

6 Clearly, the services that were provided to ANA under the correct SGHA; at the
 7 gate; during pushback; and, during tow to the engine start line, had nothing to do
 8 with any claim or defense asserted in this litigation or this accident. The same is true
 9 for the Ramp Controller services that were provided to ANA. The Ramp Controller
 10 services that caused this accident were provided by UAL to UAL when UA809 was
 11 prematurely cleared to push into ANA's path. The services provided by UAL to
 12 UAL had nothing to do with ANA's SGHA. [Torpey Decl. ¶ 5, Ex. E, pg. 3.]

13 ANA's Complaint, however, tells a different story and ties ANA's asserted injuries
 14 directly to the marshalling services that United provided to ANA under the terms of the 1998
 15 SGHA and Annex B thereto. Under Annex B to the 1998 SGHA, United is obligated to provide
 16 "marshalling" services to ANA. (*See* Torpey Decl. ¶ 5, Ex. E, Attachment 3, 1.1.1, which
 17 incorporates § 6.1.1 of the 1998 SGHA (Ex. E, Attachment 1).) "Marshalling" is not defined
 18 anywhere in the 1998 SGHA or its Annex B, but 1998 SGHA clearly identifies it as a "ramp"
 19 related activity. (Torpey Decl. ¶ 5, Ex. E, Attachment 1, § 6.1.1.) The dictionary definition of
 20 "marshalling" defines the term to mean, essentially, "positioning" or bringing together or in order
 21 in an appropriate or effective way, or "leading." *See, e.g.*, WEBSTER'S NEW COLLEGiate
 22 DICTIONARY 699 (1981). This is exactly the kind of service of positioning and/or arranging traffic
 23 at the ramp that ANA alleges United was negligent in providing to ANA in the second count of
 24 the Complaint:

25 33. On October 7, 2003, the ramp controller at Terminal G of San
 26 Francisco International Airport was an employee of defendant UAL. The Terminal
 27 G ramp controller was responsible for directing all aircraft operating in Boarding
 28 Area G and the surrounding non-movement areas.

1 34. NH007 [ANA's aircraft] relied on defendant UAL's ramp controller :
 2 (a) provide proper clearance and instruction for taxiing; (b) issue traffic advisories
 3 and safety alerts; (c) maintain separation of aircraft operating in the vicinity of
 4 Terminal G; (d) ensure that no collisions occurred; and (e) organize the flow of
 5 traffic.

6 35. It was and is the primary purpose and obligation of the defendant
 7 UAL's ramp controller to prevent a collision between aircraft operating in the system
 8 and to organize and expedite flow of traffic in the areas under its control in and about
 9 Terminal G.

10 36. It was and is the duty of defendant UAL's ramp controller to issue
 11 traffic advisories and safety alerts.

12 37. It was and is the duty of defendant UAL's ramp controller to pay
 13 attention to all aircraft and no focus on one area to the exclusion of other.

14 [Complaint (Doc. No. 1), ¶¶ 33-37]

15 Because ANA has alleged that United's marshalling services were negligent, the Liability
 16 and Indemnity provisions of Annex B to the 1998 SGHA apply. These provisions are
 17 substantively identical to those that form the basis of United's Counts Three and Four of the
 18 Counter-Complaint, as well as United's SGHA-based affirmative defense:

19 Release Carrier hereby releases Handling Company, its directors, officers
 20 employees and agents from any and all liabilities, claims, demands, suits, damages
 21 and losses, including, without limitation, all attorney's fees, costs and expenses in
 22 connection therewith or incident thereto which may accrue to Carrier against
 23 Handling Company for loss of, damage to, destruction of, any property owned or
 24 operated by Carrier, including without limitation any aircraft, in any manner arising
 25 out of or in any way connected with the services furnished or to be furnished by
 26 Handling Company under this Agreement.

27 Hull Damage Exception Notwithstanding the provisions of 4.2 above, Handling
 28 Company shall indemnify Handling Company or by Handling Company's actual

1 intent to cause such loss or damage, provided that Handling Company's obligation
 2 with respect to such loss or damage shall not, in any event (i) exceed [\$1.5 million]
 3 or (ii) apply to such loss or damage of an amount less than [\$3,000] [2]

4 Indemnity. Carrier agrees to indemnify and hold harmless Handling Company . . .
 5 from and against any and all liabilities, claims, demands, suits, damages and losses,
 6 including, without limitation, all reasonable attorneys' fees, costs, and expenses in
 7 connection therewith or incident thereto . . . for loss of, damage to, destruction of,
 8 any property whatsoever . . . in any manner arising out of or in any way connected
 9 with goods and services furnished or to be furnished by Handling Company under
 10 this Agreement, all whether or not arising in tort or occasioned in whole or part by
 11 the negligence of Handling Company of any type or degree . . . [Torpey Decl ¶ 5,
 12 Ex. 5, Attachment 3, ¶ 4.]

13 What all of this means is that, cutting through all the verbiage, ANA's September 25,
 14 2007, letter criticizing United for unintentionally appending outdated contract documents to its
 15 Answer, Affirmative Defenses, and Counter-Complaint really highlights a distinction without a
 16 real difference. Even under the documents that ANA contends constitute the operative contractual
 17 relationship between the parties, ANA still alleges that United negligently provided services to it
 18 under the 1998 SGHA and Annexes thereto and United still has full recourse to the Liability and
 19 Indemnity provisions of Annex B to the 1998 SGHA, which are identical in all substantive aspects
 20 to the "outdated" contract provisions upon which United based its Affirmative Defenses and
 21 Counts Three and Four of its Counter-Complaint. Therefore, the terms of the 1998 SGHA and its
 22 Annexes are very much at play in this litigation, and ANA's denial of this fact places the
 23 underlying negotiations, history, meaning, and effect of these documents squarely at issue. It is
 24 necessary for ANA to produce its PMK as to these issues to permit United to explore these topics

² Although the limits of liability provisions in Annex B to the 1998 SGHA are left blank, Annex B provides that "except for the terms set forth in this Annex B, the terms of the Main Agreement and Annex A of the SGHA of April 1998 . . . shall apply as if such terms were repeated here in full." (Torpey Decl. ¶ 5, Ex. E, Attachment 3, PREAMBLE.) The 1998 SGHA provides the \$1.5 million damages ceiling for hull damage and the \$3,000 floor for indemnification.

(Torpey Decl. ¶ 5, Ex. E, Attachment 1, Art. 8.5.)

1 fully and fairly.

2 **3. This Motion to Compel**

3 United's final position is that it is necessary to depose a PMK on issues related to the 1998
 4 SGHA and its applicability to this litigation in light of (1) its (soon to be amended) counter-claims
 5 for breach of contract and declaratory relief, which will assert that the plain terms of the 1988
 6 SGHA and its Annexes clearly require ANA to indemnify United for any damages related to the
 7 October 7, 2003, collision and/or provide that United's liability, if any, for damage to ANA's
 8 airplane is capped at \$1.5 million, and, more significantly, (2) ANA's assertion that the 1998
 9 SGHA and its Annexes have no application to the facts of this litigation, despite their clear terms
 10 (*See Torpey Decl., ¶ 7*) In other words, the PMK deposition is calculated to uncover relevant
 11 information concerning ANA's own defenses. There is also nothing in the Federal Rules of Civil
 12 Procedure that requires United to choose a certain form of discovery in relation to the SGHA or
 13 somehow justify the use of a deposition to examine and test the opposing party's view of the intent
 14 and meaning of a contract like the SGHA, especially when the opposing party itself has placed
 15 intent and meaning squarely at issue by denying the applicability of the contract to the
 16 controversy. (*See Torpey Decl., ¶ 8.*)

17 ANA's position, on the other hand, is that it is permitted to resist lawful discovery without
 18 filing a protective order under Fed. R. Civ. P. 26(c). ANA's refusal is also premised on its belief
 19 that United must somehow refute ANA's own defenses to United's cross-claims for breach of
 20 contract and declaratory relief before United is entitled to conduct discovery on issues concerning
 21 the meaning and application of the SGHA, issues that ANA itself has brought to the fore in light
 22 of its responses to United's counter-claims. (*See Torpey Decl., ¶¶ 3, 5, Exhs. B, C, and E.*) ANA
 23 also believes that United must justify its use of a deposition to discover the information it seeks
 24 from the PMK. ANA has not cited any court rules to support its contentions (*See Torpey Decl.,*
 25 *¶¶ 3, 5-8.*)

26 **B. THE MOTION FOR PROTECTIVE ORDER UNDER FED. R. CIV. P. 26(c)**

27 Discovery in this lawsuit will involve the production of certain very sensitive, confidential
 28 financial information concerning the operations and practices of each airline party. As to this

1 point, both parties seem to agree. Although the parties have entered into a “Code Share”
 2 Agreement that requires them to cooperate to a certain extent in their operations (ANA and United
 3 are both part of the Star Alliance and as such, can sell tickets on each other’s flights), they are, at
 4 base, competitors in a very tight market. If one party were to gain access to the “right”
 5 confidential, proprietary information regarding the other party’s costs for something such as
 6 overhead and profit margins, for example, it could very well gain a definite competitive edge over
 7 its opponent. (Torpey Decl. ¶ 9.)

8 In particular, to support its claim for damages, United will rely in great part upon the
 9 “Turns Report” relating to its 777 aircraft (N222UA) from the date of the October 7, 2003,
 10 incident until the aircraft’s return to service date some five weeks later after repairs were
 11 completed. This document provides a profitability analysis of the subject aircraft and reveals
 12 highly confidential and proprietary information regarding overhead costs, labor costs, and material
 13 costs that is kept secret from United’s competitors for obvious reasons. United can only produce
 14 this document if a protective order is in place that permits it to designate certain sensitive materials
 15 like this to attorneys’ eyes only. (Torpey Decl. ¶ 9.) And, of course, this proposed protective
 16 order, which is attached as **Exhibit 1**, works both ways and permits ANA to seek the same
 17 protection for its own confidential and proprietary, trade secret information. This Court’s own
 18 Standing Order on Confidential and Sealed Documents provides the roadmap by which the parties
 19 can and will make designations of “Confidential” or “Confidential – Attorneys’ Eyes Only” and
 20 makes it clear that over-designation may result in sanctions.

21 ANA, however, has refused to cooperate and stipulate to the proposed Protective Order
 22 attached as **Exhibit 1**, although the parties have made significant headway in paring down certain
 23 issues surrounding the proposed Protective Order and incorporating and deleting certain language
 24 in connection with their meet and confer, as fully explained in the Declaration of Scott Torpey
 25 (**Exhibit 2**) at Paragraphs 9 to 18. As explained in the Declaration, while the parties have
 26 attempted to reach an agreement on all points, they have not been successful in doing so.
 27 Therefore, for the reasons set forth in the Declaration of Scott Torpey detailing the parties’ meet
 28 and confer and their respective stances on the disputed portions of the proposed Protective Order,

1 United submits the proposed Protective Order in its present incarnation (**Exhibit 1**) and requests
 2 that this Court enter this order to provide **both** parties with the full and vigorous protections
 3 afforded therein.

4 **ARGUMENT**

5 **C. THIS COURT SHOULD ENTER AN ORDER COMPELLING**
 6 **PRODUCTION OF THE PMK**

7 United has properly noticed the PMK deposition under Fed. R. Civ. P. 30(b)(6), which
 8 provides, as pertinent:

9 (6) *Notice or Subpoena Directed to an Organization*. In its notice or
 10 subpoena, a party may name as the deponent a public or private corporation . . . and
 11 must describe with reasonable particularity the matters for examination. The named
 12 organization must then designate one or more officers, directors, or managing agents,
 13 or designate other persons who consent to testify on its behalf; and it may set out the
 14 matters on which each person designated will testify . . . The persons designated
 15 must testify about information known or reasonably available to the organization . . .

16 ANA's position against producing a PMK in response to United's September 12, 2007,
 17 Amended Notice of Taking Video Depositions is, first and foremost, that it may resist this
 18 discovery without filing a motion for protective order under Fed. R. Civ. P. 26(c). Fed. R. Civ. P.
 19 30(b)(6), however, does not give ANA the option of resisting the notice for the PMK deposition
 20 on its whim. Instead, it provides that ANA "**must**" designate its PMK(s) in response to the notice,
 21 who then "**must**" testify on the matters that have been identified for examination. Use of the
 22 word "must" designates a mandatory provision. *See Ashmus v. Calderon*, 31 F. Supp. 1175, 1187
 23 (N.D. Cal. 1998) (use of word "must" denotes a mandatory provision). The only mechanism by
 24 which ANA can avoid designating a PMK is by moving for a protective order under Fed. R. Civ.
 25 P. 26(c), something it has not done.

26 Moreover, nothing in the Federal Rules of Civil Procedure requires a party to effectively
 27 prove its case before it is entitled to obtain discovery on a given issue. "[T]he deposition
 28 discovery rules are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S

1 495, 507 (1947). “Parties may obtain discovery regarding any non-privileged matter that is
 2 relevant to any party’s claim or defense. . . .” Fed. R. Civ. P. 26(b)(1) United bases two of its
 3 claims (and one of its affirmative defenses) on the terms of SGHA and its Annexes. ANA admits
 4 the parties entered into the 1998 SGHA but denies that it has any applicability to the subject
 5 matter of this case, despite ANA’s own allegations of negligence in United’s provision of services
 6 under the 1998 SGHA and the clear language of the provisions of the SGHA and its Annexes upon
 7 which United relies for its Affirmative Defenses and Counter-Complaint, particularly Counts
 8 Three and Four. Under these circumstances, ANA’s views on the 1998 SGHA and its Annexes,
 9 their terms, the intention underlying their adoption, and the negotiations leading to its execution
 10 are all relevant. Accordingly, United should be permitted to explore ANA’s position on these
 11 issues fully in discovery. To this end, this Court should require ANA to produce its PMK(s) in
 12 response to United’s deposition notice.

13 For some reason, ANA believes United must justify its use of the deposition in relation to
 14 other available discovery devices to obtain the information it seeks from ANA’s corporate
 15 representative concerning the SGHA. ANA, of course, is well aware of the superiority of
 16 depositions upon oral examination to other forms of discovery. One authoritative text has
 17 described depositions as “a key element of civil dispute resolution,” noting their crucial
 18 importance “not only in basic discovery but also preservation of information and establishment of
 19 facts crucial to settlement or rulings on pretrial motions.” 7 MOORE’S FEDERAL PRACTICE §
 20 30.02[3] (3rd ed.). There simply is no need under the Federal Rules of Civil Procedure for United
 21 to justify its use of such a crucial discovery mechanism to discover the information for which it
 22 searches. The Rules, in fact, provide that United has a right to seek any deposition without leave
 23 of court, except in very few limited circumstances that are not present here. Fed. R. Civ. P. 30(a).

24 ANA’s suggestion that United should use other discovery devices is unjustified in light of
 25 Fed. R. Civ. P. 30(a)(1) and simply unworkable. ANA suggests that United should use contention
 26 interrogatories³ to explore ANA’s views on the applicability of the 1998 SGHA and its Annexes
 27 But, the “better” view is that contention interrogatories “are appropriate, but only after both sides

³ A “contention interrogatory” is an interrogatory that inquires “into an opinion or contention that relates to fact or the application of law to fact.” 7 MOORE’S FEDERAL PRACTICE § 33.02[2][b]¹⁴

1 have had an opportunity to conduct discovery.” 7 MOORE’S FEDERAL PRACTICE § 33.02[2][b]. At
2 this relatively early stage of discovery, when there are many depositions yet to be taken,
3 contention interrogatories simply are not helpful. Contrary to ANA’s other recommendation,
4 requests for admission are not suited for United’s purpose of eliciting information because they are
5 useful only “to establish admission of facts about which there is no real dispute.” *Safeco Ins Co*
6 *of Am. V. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998) (requests for admission are not
7 principally a discovery device because their purpose is to establish certain material facts as true,
8 thus narrowing range of issues for trial).

In summary, ANA is entirely unjustified in its refusal to produce its PMK(s) in response to United's deposition notice. Therefore, United respectfully requests that this Court enter an order under Fed. R. Civ. P. 37(a) to compel ANA to produce its PMK(s).

D. THIS COURT SHOULD ENTER THE PROPOSED PROTECTIVE ORDER

As explained, *supra*, United is willing to produce certain documents containing highly confidential information to ANA in response to discovery requests, provided that a two-tiered Protective Order is in place that permits the parties to designate certain highly sensitive documents “Confidential – Attorneys’ Eyes Only.” Attached hereto as **Exhibit 1** is a proposed Protective Order that provides just this sort of protection, consistent with Fed. R. Civ. P. 26(c)(7). This Court’s Standing Order on Confidential and Sealed Documents is in place to provide means by which the parties can designate certain documents “Confidential” or “Confidential – Attorneys’ Eyes Only” and, in connection with the procedures to curb over-designation and abuse that are built in to the proposed Protective Order, will protect the rights of each party and, more importantly, shield this Court from any burden associated with unnecessary confidential designations. Accordingly, United requests that this Court enter the proposed Protective Order for the reasons set forth more fully in the Declaration of Scott Torpey, which details the parties’ meet and confer on the proposed Protective Order and explains and supports United’s position on the provisions and language upon which the parties were unable to agree.

CONCLUSION

28 ANA's refusal to comply with the PMK deposition notice and its refusal to agree to the

1 terms of a two-tiered protective order to prevent the disclosure of both parties' sensitive and
2 extremely confidential information are unjustified. Accordingly, this Court should enter an order
3 compelling ANA's immediate compliance with the PMK deposition notice and the proposed
4 Protective Order attached hereto as **Exhibit 1**.

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CERTIFICATE OF SERVICE

I am a resident of the State of Michigan, over the age of eighteen years, and not a party to the within action. My business address is 27777 Franklin Road, Suite 2500, Southfield, Michigan 48034. On October 9, 2007 I served the following document(s):

United Airlines' Motion to Compel Production of Person Most Knowledgeable and for Protective Order

By:

- Electronic Service:*** I hereby certify that on October 9, 2007 I electronically filed the foregoing paper with the Clerk of the Court using the ECF System which will send notification of such filing to the following:

Marshall S. Turner
Condon & Forsyth LLP
7 Times Square
New York, NY 10036

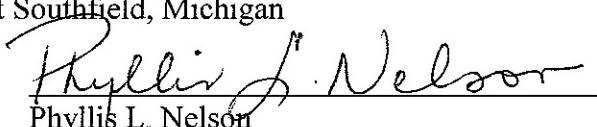
Frank A. Silane
Rod D. Margo
Scott D. Cunningham
Condon & Forsyth LLP
1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010

Jeffrey A. Worthe
Worthe, Hanson & Worthe
1851 East First Street, Ninth Floor
Santa Ana, California 92705

- By Facsimile:*** I caused the above-referenced document(s) to be transmitted by facsimile machine to the person(s) at the addresses set forth above.
- By Mail:*** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Southfield, Michigan in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- By Personal Service:*** I caused the above-referenced document(s) to be personally delivered by hand to the person(s) at the address(es) set forth above.
- By Overnight Courier:*** I caused the above-referenced document(s) to be delivered by Federal Express to the person(s) at the address(es) set forth above.

Federal: I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED on October 9, 2007 at Southfield, Michigan



Phyllis L. Nelson